Opening: Trop p. 568
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IN THE CIRCUIT COURT FOR THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

Case No. 00-01706 CA 22

LYNN FRENCH,
Plaintiff,
vs.
PHILIP MORRIS INCORPORATED,
("PHILIP MORRIS U.S.A."),
R.J. REYNOLDS TOBACCO COMPANY,
LORILLARD TOBACCO CO., and
BROWN & WILLIAMSON TOBACCO
CORP., Individually and as Successor
to the AMERICAN TOBACCO COMPANY,
Defendants.
_____/

VOLUME 5
PROCEEDINGS BEFORE
THE HONORABLE FREDRICKA G. SMITH
June 5, 2002
9:30 a.m. to 12:00 p.m.

73 West Flagler Street
Court Room 6-2
Miami, Florida 33130

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BY: WILLIAM C. McCUE, ESQ.

(Jury not present)
THE COURT: Good morning.
Are we ready for opening statements?
MR. REILLY: One small matter, your Honor.
MR. TROP: Two.
MR. REILLY: Your Honor, I understand that yesterday at the end of the day there was a review of the Julius Richmond trial testimony.
THE COURT: We didn't complete it, but we started.
MR. REILLY: I understand that there was a ruling by your Honor that you would allow a read or a viewing of Dr. Richmond indicating that environmental tobacco smoke causes lung cancer.
I just wanted to provide your Honor with the cases that indicate that would be completely inappropriate in a sinusitis case. If you don't have those cases already, I think we offered them up to you, and I think the plaintiffs will show the video testimony of Dr. Richmond that will indicate he is going to tell them that environmental tobacco smoke causes lung cancer.
THE COURT: Were you intending to say that?
MR. TROP: No, I won't say that. I am going to say it causes disease.

THE COURT: This disease in particular?
MR. TROP: Yes.
MR. REILLY: See, you already have an instruction. You already indicated that they can show that part of Dr. Burns' testimony in which he lists the series of diseases.
THE COURT: Respiratory type diseases.
MR. REILLY: Beyond respiratory, but let's encapsulate it in that phrase. But you are instructing them with a special instruction which we are offering up to your Honor today they are not making a claim for any of those diseases.
I don't understand why we have to talk about diseases other than the one that the plaintiff is claiming in this lawsuit. It just seems not only irrelevant, but also prejudicial to the defendants in this case.
THE COURT: I will let the plaintiffs say that ETS causes disease and in particular causes this disease, not make a reference to lung cancer at this point.
MR. TROP: Judge, we have one matter. We had a chance to look at each other's demonstrative aids and they have quite a number of them.

I have an objection to one of them and I have discussed it with counsel. We don't agree on it. They have a big one there, but this is -- if I may just step a little closer.
It's a graph. I can't tell the court that I fully even understand it, but it appears to show how many days she did not fly and then it says total days absent and then it has a breakdown for sick and --
THE COURT: Sick and what?
MS. TEDDER: Sinusitis.
MR. TROP: I think what this is is they went through her personnel records and if it specifically said the word sinus or something, I'm out because of sinus, then they give a little red mark.
It indicates here that she has only had a few absences from '87 to '89 for sinusitis. It doesn't show the days she worked, it shows the days that she is absent on a whole year.
Flight attendants only work 12 days a month to begin with. It's very misleading. I think it's to the point of being deceptive.
THE COURT: Can I see it up close, please?
Why is it deceptive?

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MR. TROP: Well, Judge, it indicates that she only had a certain, a few days where she was sick. You know, just because the personnel records happen to mention sickness on a certain day or happen to mention sinusitis, they come up with a chart --

THE COURT: I am not sure what you are saying. You are saying that some of the sick should include sinusitis?

MR. TROP: Right. They shouldn't have a chart that said she only had sinusitis for those two years. She had sinusitis for 15 years.

THE COURT: If it is explained that this comes from those records and it was just using the words from the records, I don't think it's misleading.

MS. TEDDER: And that's what it is, your Honor. We are just going to tell them that's what the TWA records show. If Mr. Trop wants to say the plaintiff is going to say something different, that's just what the record show.

MS. WEINSTEIN: Judge, that includes weekends, holidays. The implication is that she is absent from work as though let's say I am absent from work two days a week. Even though I

work a five day week, I am absent two days because I am not there Saturday and Sunday and so it gives a false impression of a poor work record and absenteeism from work when in actuality she is not absent.

This doesn't reflect her absence from scheduled days, it reflects a number of days that she was off also.

THE COURT: Is that right?

MS. TEDDER: It reflects the total number of days. It's just a compilation of what is in the records about what the records say about the days that she wasn't at work.

She requested leave. For example, if she requested 30 days leave, that reflects 30 days. I think that it can be explained that she works -- I mean, as I understand it, she requests 30 days leave so that she has the whole 30 days off. So she is not scheduled to work any point in time during that 30 days. That's what that reflects.

THE COURT: I think you can explain it. I am not sure I quite understand though. In 1979 it shows 225 days absent.

MS. WEINSTEIN: Judge, she was hired in May

of 1979.

MS. TEDDER: No, 1976.

MS. WEINSTEIN: I'm sorry, 1976.

THE COURT: In 1979 it shows 225 days. That's the highest tower here. It says 225 days absent.

Now, are you saying that it didn't mean that she was supposed to be working all of those 225 days?

MS. WEINSTEIN: Correct.

THE COURT: So how many of those days was she supposed to be working?

MS. WEINSTEIN: I don't know. They made the chart.

MR. TROP: That's the question.

MS. WEINSTEIN: The point is the jury is left to figure that out, but the implication is that she was supposed to be working but wasn't.

I don't think the defendants can explain either how many days she was supposed to be working, because there aren't any schedules from those days.

MR. REILLY: Judge, this isn't a supposed to be a working schedule. This is not a supposed to be a working chart. This is a chart that shows

available days to be exposed to environmental tobacco smoke on board airplanes.

Now, flight attendants don't work like you and I work, an eight day a week week. That's the way we work. However, most folks work a five day a week work week. Flight attendants don't work a five day a week work week. So we can't show a five day a week work week.

We would be delighted to. The only thing that we can show based on the records that TWA has and which she has been deposed about and has agreed with, she took off extended periods of time for what they call butterfly leave.

What is butterfly leave? The TWA folks would decide that they had too many people on staff, too many flight attendants, so they would say okay, we are going to offer two things.

We are going to offer butterfly leave, which means anybody with any level of seniority can take off. You are not going to get paid, but you won't get penalized and we are not going to furlough the lowest ranking from a seniority standpoint people first.

We will give every flight attendant the opportunity to say "Look, I don't want to work

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for the next six months." Ms. French, for whatever reason, would decide that she would just take her butterfly leave.

THE COURT: Let me say this. Would the plaintiff's objection be at all addressed if instead of calling this total days absent, it was called total days not working?

MR. REILLY: Or total days unexposed?

THE COURT: I don't think the defendants are going to use this to show that the plaintiff was a bad employee and took all this time off. They want to show --

MS. TEDDER: That's exactly right.

THE COURT: That she wasn't exposed to ETS for this many days in this year and I think that's appropriate.

MS. WEINSTEIN: I think the way it's worded -- this isn't what they are going to show. It's a three by four posterboard that says days absent from work.

MS. TEDDER: That's exactly what it says.

THE COURT: Total days not working or something like that?

MS. TEDDER: Days not exposed.

MS. WEINSTEIN: Your Honor took a few

minutes to try to decipher this.

THE COURT: I think they can make it clear when they present this. I don't think it's unfair, I think it just has to be clear, and besides, the defendants are not taking the position that she wasn't a good worker and took too many days off. It's to their advantage to show that she wasn't working because that would mean that she wasn't exposed during that period, but they are not saying anything else negative about her.

MS. WEINSTEIN: I think it's misleading, your Honor. In 1976 there is a chart saying this is all the days she didn't work. She was hired in the middle of the year. To me there is an implication there that this woman just didn't work too much. Maybe she is lazy, whatever, but it's misleading.

THE COURT: I don't think they are doing it for that reason and I will require when they offer this, they will make that explanation or say something that this is simply showing the days that she wasn't exposed to ETS and it's not a comment at all about anything else if you want them to say that.

MS. WEINSTEIN: And she wasn't available because she wasn't scheduled to work all those days.

THE COURT: I don't think that matters because I don't think that is an issue in the case. There is no issue in the case about whether she was a good worker.

Instead of using the word absent, I mean, it's on their chart, but maybe they can say what this means is these are days that she was not --

MS. TEDDER: Exposed.

THE COURT: She was not exposed because she wasn't at work, she wasn't at work and she wasn't exposed.

MS. TEDDER: I will be happy to say that.

THE COURT: I think that will clarify it and you can of course clarify it.

Did you decide how much time you will actually need for opening? How much will the plaintiff need?

MR. TROP: I will say 45 minutes, Judge.

THE COURT: I don't usually time openings, but I think we will keep track of it today. So 45 minutes. Then would you like a warning at five minutes or something?

MR. TROP: I'm saying 45 minutes, but if they are going to get more, I would like to say an hour. If we are both going to get the same amount of time.

MR. REILLY: Your Honor, you didn't give us a restriction before.

THE COURT: You said you would take an hour and a half.

MR. REILLY: Approximately. Again, I haven't timed this, and of course, it depends. I mean, I am dealing with a situation where I know that plaintiff's counsel tape recorded my opening from two weeks ago.

THE COURT: Excuse me for interrupting, but plaintiff, you can have an hour if you want. Would you like a warning?

MR. TROP: At 45 minutes.

THE COURT: When there is 15 minutes left.

You can have an hour if you need it and a half hour if you need it. I realize that's more for the defendants, but that's the way we are going to do it because that's what you have asked for, but I don't want you to go on longer than that.

MR. ENGRAM: Your Honor, yesterday your

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Honor asked for the copy of the Lee case about the Surgeon General's report. Mr. Weinstein didn't have a chance to see it.

MR. McCUE: Your Honor, there is one other matter with regard to the disclosure of the lineup of the witnesses. We have gotten that from the plaintiffs yesterday. Included was Jason Brown. Edward Brown.

My understanding is that the court was going to require a proffer before you were going to rule on whether he could testify in this case. I don't know when the court wants to do that.

THE COURT: Sometime before he testifies.

Okay, bring the jurors in.

(Jury present)

THE COURT: Good morning.

I think you all have your notepads and I have given you the preliminary instructions, so we will proceed at this point with the opening statements by counsel.

Let me just remind you that what the attorneys say is not evidence in the case and it is not your instruction on the law either. Of course, in opening statement, what they are permitted to do is they may refer to the evidence

that they expect is going to be presented before you.

You probably understand that before a trial there is a lot of what we call discovery that goes on where each side can find out what the witnesses on the other side have to say by taking their depositions and asking them questions and finding out a lot about it. So they can tell you what they expect the evidence will show here.

They also can explain to you what the issues are in the case, and I have reviewed those with you briefly, but they can go into that more specifically.

The counsel for the plaintiff will go first and then two of the attorneys for defendants will present opening statements, so please pay close attention.

Go ahead for the plaintiff.

MR. TROP: If it please the court, counsel: To reintroduce myself, my name is Adam Trop and along with Marvin Weinstein and Rhonda Weinstein, we represent Lynn French, and I am here now to try to explain to you as best we can why we are here, why Lynn French is here in this courtroom for what I think you are going to find

is in many ways a very, very important case.

Lynn French is here because she is sick. She has a serious and permanent disease of her sinuses. She got this disease from cigarette smoke. The thing is, though, Lynn French has never smoked a cigarette in her life. Lynn French got this disease of her sinuses from second-hand smoke.

Now, you are going to be hearing a lot about second-hand smoke. You are going to hear it described in many ways and you are going to hear it called different things. The tobacco company lawyers like to call it ETS for environmental tobacco smoke. I guess that's -- it has the word environment in it, it sounds a little different.

The Surgeon General of the United States is going to call it involuntary smoking, and you are going to hear from the Surgeon General of the United States.

We will probably just call it second-hand smoke. I mean, that's what most people call it, but you are going to learn that whatever you call it, however you describe it, it's the same thing. It's a poisonous substance with some 400 odd ingredients in it, irritants, other poisons, and

it causes people to be sick and it caused Ms. French to be sick.

Let me tell you a few things about Ms. French before we start in the beginning. She and her husband live out in California. They filed the lawsuit here, but they live in California. You may have seen her husband the first couple of days sitting in the back there.

She has four children, two of them stepchildren. She has four grandchildren, including one that was just born recently.

She comes from a family of fliers. Her father is a pilot, her daughter is a pilot and she has been a flight attendant since 1976. She worked for TWA since 1976. That's back when they even called flight attendants stewardesses, I believe.

There are a limited number of issues in this case, and I hate to call all of them issues, because some of them aren't even, there is probably a better word for it, points to consider in the case.

The first point: Lynn French has chronic sinusitis. There is no dispute about that. There is no two ways to look at that.

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Judge Smith instructed you twice, I believe, already that she has chronic sinusitis. So it's not a point to argue.

There are CAT scans of her head, which include the sinuses, and we have them and you will see them, that show that she has chronic sinusitis.

All the doctors that come in here and testify before you are going to say she has chronic sinusitis, including a doctor that they hired, they picked out and hired and paid for to examine her, and he also says she has chronic sinusitis, because you can't say otherwise. It's on the films. It's clear.

Now, I'll talk to you a little bit more about this doctor they hired later in another subject, but a little bit about chronic sinusitis. Most people know a little bit about sinuses or they heard of people say well, I have had -- I got a sinus headache or bloody nose, and with most people you have a runny nose, maybe some stuffiness and your eyes hurt or something like that and it goes away after a couple of days.

That is not what Lynn French has. She

has something different. It's a disease of her sinuses. Her anatomy, the sinuses are in here and they are up here and they are way back in here. Her anatomy changed. Her sinuses have changed. She had to have surgery on her sinuses to try to correct the problem that she has.

It's been successful to some degree, but not completely successful and she may need surgery again, and she is living with problems almost daily because of her sinus problems.

You will learn -- now, I am not a doctor. I don't think any of the lawyers here are doctors, nor are we going to pretend to be. You are going to hear doctors come in and talk to you very specifically about the science, but we know a little bit about it.

These are basically the sinuses over here (indicating). These are the big ones here called the maxillary sinuses, these are the frontal sinuses.

You will learn that the sinuses -- the body is just a remarkable thing. Every little part of the body does something special and important. The sinuses are like a filtering system. The main thing they do is like a filtering system and

in the sinuses, in here, all along here and all up in this nasal passage here and up in here are little somethings that you can describe as little tiny hairs, thousands of them. They are not really hairs, but that's the best way to think about them. They are called cilia.

These cilia do a very important thing. They function. They are intelligent. They function in a way that they move kind of like a current or like waves on the beach and when a person breathes in, whenever that person is breathing in, the cilia kind of move and they move the air and whatever else you are breathing in, all around here, and these sinuses, which are in everybody's face, behind their cheek bones and above their eyes and here, they are bones, but they are like hollow bones, almost like a coconut but without the milk inside it, just like a hollow bone, and the cilia are here and in here.

So when you breathe some kind of like a little piece of bacteria or dust or a virus or whatever, the cilia, when you are healthy and you don't have chronic sinusitis, move things along and they kind of isolate things that aren't supposed to be in there and they protect you from

disease and from illness and from bacteria and all kinds of things.

There is mucus, there is mucus in here and there are certain kinds of membranes and it pushes things along.

Well, tobacco smoke -- I told you about the cilia. It's remarkable. They are powerful little guys and they do a lot.

Unfortunately, tobacco smoke is a little bit more powerful than the cilia and it does things to the cilia. Tobacco smoke is an irritant. I told you it has got 400 some-odd different things in it and 40 really dangerous ones, maybe more. It paralyzes the cilia. It affects them.

So when you reach a certain level of tobacco smoke, exposure to tobacco smoke, it paralyzes them and they don't work and that's what happened to Lynn French over days and hours and days and weeks and months and years of constant exposure to heavy, heavy tobacco smoke and being paralyzed and paralyzed.

Over time the cilia have stopped working periodically, things don't move through like they are supposed to, bacteria and all kinds of different things have clogged up her sinuses.

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This is the CAT scan, one of the CAT scans. She had two CAT scans. Unfortunately one of them was done about 14 years ago and they destroy them after a while. This was done in 1995. This is showing -- it's a little deceptive because this is after her surgery, but you can see the anatomy, her actual anatomy has changed.

This is a different substance around here than it used to be and you can see this is all clogged up here and here. In something that is specific and functions in such a way as sinuses do, that's important.

You will learn that she has a lot of problems and she's going to be testifying for you and her doctor is going to be testifying here, but chronic sinusitis, again, this is something that is not going to be in dispute, is a serious disease. It can affect your sense of smell, your sense of taste or the way you perceive taste, it clogs up your hearing, gives you headaches, watery eyes, runny nose, makes her much, much more prone to illness, including severe illnesses, which you will hear about.

She has taken more antibiotics, has been given more antibiotics to cure illnesses than you

could imagine and her life and her life-style has changed dramatically.

The seriousness of chronic sinusitis is not going to be disputed either. They have a doctor that they hired that is going to be on videotape that will also explain how serious a disease it is.

What they did with Ms. French in 1989, because of this chronic sinusitis, in an attempted to fix it, they went in surgically. First they go in with a tube through your nose to look around, back in here, and then they went in with tools, surgical tools, in a sense kind of like a crimping tool or like pliers -- they are certainly not pliers, but that's how you can kind of think about it -- and broke, chewed off some more of the bone around the holes of the sinuses in order to try to open it up so she can breathe better.

And it worked to some extent, but you will learn that it's not perfect because her anatomy is just different now.

The second thing, the second issue or point in this case, tobacco smoke causes chronic sinusitis. Now, I don't know how much debate

there is going to be about that. Judge Smith twice already has instructed you, and when the judge says I instruct you, that's something that you need to listen to, that there is a presumption that tobacco smoke, second-hand smoke causes chronic sinusitis.

In other words, if they didn't want to deny that, if they want to disprove it, it's their burden to do so, and if they can't do it, then you presume that it causes chronic sinusitis.

Now, I don't know if they are going to deny it or not. They probably will. If they do, which we have to anticipate that they are going to do, we are going to bring you evidence about that, about the fact that chronic sinusitis is caused by tobacco smoke, and we will bring you first evidence from the top doctor in the United States, the United States Surgeon General. He is going to be here to testify by videotape.

Judge Smith has instructed you, when you see somebody on videotape, you have to consider it just as if they were here. We both have witnesses on videotape, both sides, for some reasons witnesses can't get here, and you are supposed to consider them just as if they were

there.

The United States Surgeon General, Dr. Julius Richmond, will testify and he will tell you that second-hand tobacco smoke causes respiratory, upper respiratory diseases, diseases of the sinuses.

I should say he is the former Surgeon General. He is now a professor of medicine at Harvard, but he was the Surgeon General before and he will be here to testify.

And if they dispute that tobacco smoke causes chronic sinusitis, we will bring you the testimony of another doctor, almost without doubt the top expert in the world on the effects of tobacco smoke. His name is Dr. David Burns. He will be here by videotape also and I think he will probably be the first witness you hear from, depending upon what time our opening statements end.

Dr. Burns will tell you -- a little bit about the about him. Dr. Burns is a doctor who spent basically his entire career, his medical career in government, in United States Government medicine.

He has either authored or edited or been the

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official reviewer of every single Surgeon General's report, United States Surgeon General's report since 1975. He is a world authority on tobacco smoke, and he will tell you that there is no issue: Tobacco smoke causes chronic sinusitis and diseases of the upper respiratory system.

If they choose to deny this, that the judge is going to instruct you you are to presume, they will do it with a videotape of their own. They have a videotape of a doctor named Heinz Stammberger. He is a doctor from Graz, Austria, and they have taken his videotape deposition, and Dr. Stammberger is going to tell you that tobacco smoke does not cause chronic sinusitis. Actually, he is not even going to tell you that. He is going to say that there is no data to support the position that tobacco smoke causes chronic sinusitis.

He is also going to admit that there is some 10,000 or so or more qualified ENT's, that's what he is, an ENT, in the United States, but for some reason they went to Austria to find him and to have him testify.

Dr. Stammberger is an ENT. He is an otolaryngologist is what they call it. It is the

same thing as an ENT, it just sounds a lot more official.

You are also going to hear from Ms. French's personal doctor that has treated her for the last ten years, over ten years. He practices in California, where she lives. He is going to fly in here tomorrow morning and testify. He is going to say to you that second-hand smoke does cause chronic sinusitis and that it did cause chronic sinusitis in this case, and I will tell you a little bit more about Dr. Persky in a few more minutes.

Now, the third thing. Tobacco smoke caused Lynn French's chronic sinusitis. Dr. Persky -- we are going to offer to you the best evidence that we can conceive of. Her treating doctor, that knows her, has treated her for the last over ten years, the doctor that did the surgery is going to come in here and tell you that the primary cause of her problems was from the years and years of exposure to second-hand smoke, and that's what caused her problems, and he is going to describe the way that the cilia are affected and they were damaged and that they weren't working properly and she was exposed to more and

more of this tobacco smoke and other diseases because of this.

I guess most of us probably don't remember that clearly what it was like to be on those flights back when Lynn French was first starting out and throughout her career frankly.

She started out at TWA in 1976. Tobacco smoke, smoking wasn't banned in any respect really, cigarette smoke I should say, until 1988 or 1990.

THE COURT: I'm sorry, I couldn't hear you.

MR. TROP: You are going to hear testimony from 1976 through 1990 and 1997, 1990, you are going to hear testimony from a number of people that actually flew on the planes. You are going to hear from other flight attendants that are going to come in here and tell you what the smoke was like until that time, because it is hard sometimes to remember and some of us are young enough that we couldn't remember, we weren't there.

They will describe to you how thick at times the smoke would get, that you could actually have to wave it away.

They would talk to you about how it would

make people's eye's water and nose run. They will talk to you about how the smoke would get on the seats and the instruments and you could actually see like black tarrish things or a brown tarrish thing and you would have to wipe it off over time.

They will talk to you about what they had to do. Remember, this wasn't banned until 1988 and 1990. It was making people sick.

Well, you can imagine what it was doing to the flight attendants. They are in a unique class. Ms. French was in a unique class of people.

Everybody remembers that tobacco smoke, if you are in it, you can imagine, it's annoying and it makes your clothes smell and it made your eyes water, but someone who is exposed to it over and over and over again, and not only that, the flight attendants are working on the plane. They are moving those big carts up and down with cases of soft drinks and somebody has to go to the bathroom, they have to pull it back and do all that.

They are working and they are breathing and they are breathing in the smoke that other people

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are letting out, that's coming off the end of the cigarette and that they are exhaling. And they are going to discuss that with you.

And you are going to learn that Lynn French worked approximately 80 hours a month, 70 to 80 hours a month in the air for almost all of her career, at least through 1990. You will note that they didn't even ban it on international flights until 1997, and she did do international flights also.

Now, I told you that Lynn French is going to talk to you about problems that she has, and she never had any sinus problems before she became a flight attendant and was exposed to all of this.

You are going to hear from her doctor about what this has caused. Well, what's their defense going to be to this? They have their own doctor that they hired. I told you a little bit about him before. His name is Dr. Julio Torres. He is an otolaryngologist here in town.

I have used that word twice successfully, which is a record for me, so I am going to call them ENT's from now on. It is hard to pronounce sometimes.

Dr. Torres will come in and say that Lynn

French's chronic sinusitis was not caused by the tobacco smoke. He doesn't know exactly what caused it, but it wasn't tobacco smoke.

But you have got to understand a couple of things about Dr. Torres and how they hired him first, and we, both sides have the power to subpoena people, to take their written sworn deposition before a court, and we have done that.

This is how the tobacco company lawyers went about hiring Dr. Torres. It turns out Dr. Torres has a daughter who is a lawyer and she used to work for Mr. Reilly over there's law firm, and somehow Dr. Torres' daughter got them hooked up, someone from Mr. Reilly's firm, and they went and talked to them and they met with them, and you will also learn that up until that time, before they met with him, Dr. Torres had never published anything or said anything on the record about second-hand smoke and its effects.

So they go to Dr. Torres and they meet with him and they meet with him and they meet with him a long time, and then they bring him research that they did, their research, the tobacco company's research, and they meet with him and they meet with him, and they pay him, and they

pay him, and you will learn, when Dr. Torres comes in here, because he will come in here, because we subpoenaed him too just to make sure, they have paid Dr. Torres probably at this point 30, $30,000, and he is going to come in here and he is going to testify.

It was $25,000 about a month ago. He is going to come in. I am sure they met with him more. Probably about $30,000, maybe more, and he is going to come in here and testify.

Well, let me tell you a little bit more of what they did. They met with Dr. Torres and they gave him all this research and they met with him and paid him and met with him and paid him and got a commitment from him that he does not believe that second-hand smoke causes chronic sinusitis. After reviewing all their research and meeting with them, he arrived at that opinion.

Once they got the commitment from him that he doesn't believe second-hand smoke causes chronic sinusitis, then they said "Okay, Doctor, why don't you go examine Lynn French and determine if second-hand smoke caused her chronic sinusitis," after they determined that he doesn't believe that it does, and they got a commitment

from him.

So she went and was examined by him, and guess what? Oh, I don't think, I don't think that tobacco smoke had anything to do with her chronic sinusitis. It could have been this, that and the other thing. And Dr. Torres is going to come in and tell you that.

You are going to see by the overwhelming amount of evidence that tobacco smoke and the constant exposure to tobacco smoke is what caused her chronic sinusitis and her problems.

I feel comfortable in predicting they are not going to agree that tobacco smoke caused her chronic sinusitis, and they have some defenses.

I am going to talk a little bit about them. I don't know if they are going to raise them all. One of the things, in addition to Dr. Torres, who they are going to call to come in, they have got a guy or a couple of guys that are going to come in and talk about the ventilation system on the airplanes, that they have these great ventilation systems that practically, as soon as you light up a cigarette, it gets sucked out of the air and there is no problems to anybody. Maybe it's annoying, but that's it. You know, no health

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hazards.

Of course, they don't believe even if it didn't get sucked out of the air it would cause a health problem, but they have got these guys who will come in and talk about it.

Interestingly, they don't have any witnesses that are going to come in here that actually ever spent any significant time on an airplane. They have one flight attendant that is going to come in and she spent a year on an airplane. They don't have anybody who has any experience on airplanes, but they do have these people that are going to come in and talk about this great ventilation system.

I think once you have heard the evidence about what the smoke was like and using your own common sense and experience, you will know how to judge these people that talk about the ventilation system.

They will also have someone come in that says well, cigarette smoke doesn't really -- you know, it doesn't -- the second-hand smoke doesn't amount to much, it doesn't really let that much off. You know, maybe it does something to smokers, but the rest of us, don't worry about

it. It's minute. It's not a problem. I think you can use your own common sense and experience in that one too.

They will also come in and -- have someone come in and say there were always different sections on the airplane, there is a smoking and nonsmoking section, and she wasn't always in the smoking section. She was sometimes in the nonsmoking section and she was safe there certainly.

I think you will know, you will have people describe just as when you pour a bottle of chlorine in the pool, it goes to the shallow end even if you drop it in the deep end. Smoke goes to the different parts of an airplane.

They will also probably tell you that Ms. French has some defect in her nose or something like that; that maybe she was born with something and that's the reason she has these problems. That's despite the fact that Lynn French has a twin sister without any problems, who is not a flight attendant obviously.

They have got other defenses. You will hear about them, of course. You know they are in the business of selling cigarettes and that's their

defense.

I have said just about everything I think I need to say. I know I will sit down and think of 10 or 12 things and say oh, my goodness, I forgot to tell you, but I noticed you were watching me attentively and I appreciate your doing so. I know you will do so with Mr. Reilly and Ms. Tedder. They are both very good lawyers.

I just ask you before I sit down that throughout this period, we will move a lot faster than we have the last couple of days, that you just don't lose sight of your common sense and experience in your search for the truth.

I thank you.

MR. REILLY: Good morning.

JURORS: Good morning.

MR. REILLY: Let me reintroduce myself as well. I am Ken Reilly, and along with Gay Tedder, we are going to give the opening statements for the defendants in this case.

I'm going to talk to you about sinusitis and Mrs. French's chronic sinusitis and Ms. Tedder is going to talk to you about her exposure to second-hand smoke, I have no problem calling it second-hand smoke, while she worked as a flight

attendant and smoking was permitted on aircraft. Okay?

I think it's important to start off any opening statement by saying thank you to you folks for sitting here and serving as jurors. I can tell you that I know, we all know, that you have taken time away from your families, your work, the things you would like to be doing instead of being here, but you are truly the most important part of our civil judicial system.

The service you are performing now is extremely important to all of us and to our system as a whole. So on behalf of every lawyer and every party here, we thank you for your service.

Now, let's talk about opening statements. An opening statement is an opportunity for the lawyers in the case to outline for you what are the issues that you are going to have to be dealing with and what is the evidence that we are going to present to address those issues.

But to me it's more than that. The things I say to you now are my promises to you about what the evidence is going to be and at the end of the case, and this holds true for the plaintiffs as

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well as me and as well as Ms. Tedder, at the end of the case, you will get an opportunity to review what I have said to you now, what Ms. Tedder says to you now and what the evidence turns out to be while it is being presented during the course of the trial, and you will get to determine whether or not I have kept my promise, whether Ms. Tedder has kept her promise and whether the plaintiffs have kept their promise, because everything that Mr. Trop just said to you were the promises of the plaintiffs as to what the evidence is going to be in this case. Okay?

Now, what are the issues in this case? The judge read them to you yesterday. I guess maybe it was the day before yesterday.

Can everybody see that? Have I got that lined up well?

There are really only two issues in this case. The first one is was Ms. French's chronic sinusitis caused by her exposure to, we have put ETS, or second-hand smoke, on board aircraft while smoking was permitted?

That's an issue that the plaintiff, Ms. French and her lawyers, have the burden of

proving to you. They have to prove it to you by the greater weight of the evidence. That's their job. If they don't do it, they can't win this lawsuit.

The only other issue in this case is does environmental tobacco smoke cause chronic sinusitis in anybody? We have the burden of addressing that issue. Mr. Trop referred to it as a presumption, but in fact it's the same burden that they have. We have the job, and Mr. Trop wondered whether or not we are going to address it.

I promise you, as I stand here right now, we will be addressing this issue in a very major way with one of the finest experts in the world.

Mr. Trop wondered why we went to Austria to get Dr. Stammberger. It's because he is recognized as one of the leading experts, a handful of the leading experts in the world on sinus diseases, the sinuses and diseases of the sinuses.

Do you know who feels that way? Not just Ken Reilly. Remember he told you about Dr. Persky, the guy who is going to come from --

MR. WEINSTEIN: May I approach the bench?

THE COURT: About what?

MR. WEINSTEIN: About a statement.

THE COURT: I really want to avoid that. I don't know that it's necessary, but I will hear you at this time. Come on up.

(At the side bar.)

MR. WEINSTEIN: Judge, I object to counsel -- I knew he was going to say that. Our doctor acknowledges that he is an expert and it's improper. It's improper to buttress their doctor.

THE COURT: I don't see why. It seems to be perfectly proper to me. What's improper about it?

MR. WEINSTEIN: For one doctor to ask the opinion and tell this jury that other doctors consider him to be -- they have to stand on their own testimony and their qualifications.

THE COURT: If you can, show me somewhere where a witness can't be asked if he respects another witness, recognizes that he is an expert and ask his credentials? I don't see why not.

MR. WEINSTEIN: Judge, I stand on the record. You cannot ask one witness to comment on the expertise or the credibility of another

witness.

THE COURT: You can't ask an expert, perhaps, to comment on the testimony of the other witness and whether it's truthful or not. That's not what he is saying. That's a different question. That's different.

I don't know of any case or any law that says that you can't ask expert A do you think expert B, do you think he is a good expert? Just like you can ask any witness.

MR. WEINSTEIN: I absolutely state that emphatically.

THE COURT: Show me a case.

MR. WEINSTEIN: In the meantime, I ask -- he couldn't do that during the trial. I will get the cases that talk about how you cannot enhance the credibility or the reputation --

THE COURT: We are not going to go back and forth on this. If you show me a case --

MR. WEINSTEIN: How can I on this short notice?

THE COURT: I will permit it.

MR. WEINSTEIN: Right now?

THE COURT: Yes.

MR. WEINSTEIN: Then they heard it already.

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THE COURT: You should be prepared.
MS. WEINSTEIN: I didn't know that he is going to say that here.
THE COURT: Sorry, I am going to let him say it and if you find a case that says you can't ask expert A do you think expert B is a smart person, do they have a good training, do you respect his opinion, you may let me have it. I don't know why you can't.
MR. WEINSTEIN: It's absolutely inadmissible, Judge.
THE COURT: Show me something.
MR. WEINSTEIN: You cannot enhance.
THE COURT: I am going to let him do it unless you show me.
MR. WEINSTEIN: It is improper to let one doctor comment on another doctor's qualifications.
(Jury present.)
MR. REILLY: As I was saying, Dr. Persky, the doctor that the plaintiffs are going to bring from California, is going to acknowledge that Dr. Stammberger is in fact one of the leading authorities in the world on chronic sinusitis. So now you know why I got a guy from Graz,

Austria.
These are the only two issues that are going to be in play in this case. The same evidence that we are going to present to you to satisfy this issue is the evidence that we will be presenting to address whether or not Ms. French's chronic sinusitis was caused by her exposure to second-hand smoke on board aircraft. This is the plaintiff's burden and they will not be able to meet this burden in this case.
We have asked you folks to come in and participate in this lawsuit and I am willing to bet a dollar to a donut -- there may not be any difference in price these days, but I am willing to bet that virtually none of you have had an occasion to think about sinuses or your sinuses or to know much about your sinuses in your lives. It's just not something that comes up every day.
I think it's only fair, to help you follow the evidence as we go through it in this case, if we tell you a little bit about your sinuses, why we think we have them, what function they perform and then what is or what do we believe chronic sinusitis to be. So that's what I am going to spend some time doing right now.

This is an artist's drawing that I got out of a book of it looks like a lady who has got her sinuses depicted in pink.
You have eight sinuses. The two sinuses that we are most interested in in this case are your right and left maxillary sinuses. I have written right maxillary sinus there for you.
If you were to put your fingers right here, you would feel your sinuses, except you really can't feel them. You have sinuses above your eyebrows, you have sinuses behind your head, behind your eyes and you have these sinuses down here.
Why do we have sinuses? Well, you know, we don't come -- when the doctor spanks us on the bottom, you don't come with an instruction book, right?
So doctors have had, doctor scientists have had to try to decide why in the world were we made with sinuses, and the best they have come up with so far is, and this is going to sound a little odd, but one of the big reasons why they think we have sinuses is because they are hollow cavities in our head and they make our head lighter, so it's less strenuous for our neck to

hold our head up.
The other major reason why doctors think we have sinuses is because they produce mucus. These hollow cavities, these spots in our skull that are hollow are lined with little sacs that have tissue in them. It is not skin like on your hand, but it's tissue. It's a form of skin. They line these hollow spaces and they produce mucus.
And that mucus flows -- you are making it right now. You have made it every day since you were born. You will make it every day until you die. That mucus flows through the sinuses, down these channels or from here up and into this canal and into your nasal passages.
Now, your nasal passages are different from your sinuses. I have got another artist's depiction taken out of another book that shows that.
If somebody can't see this, please tell me.
When you take a breath, that air did not go into your sinuses, it went -- here is your nose. It goes into your nasal passages, down the back of your throat and it divides here and goes into your trachea and down into your bronchus and down

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into your lungs.

How can you tell that it didn't go into your sinuses? You can do that physically. If you put your hand on your diaphragm and take a breath and exhale it, you will feel your diaphragm move in and out because the air just flowed in that pattern I just described for you straight on down to your lungs.

If you put your hands here on your cheeks and take a breath? You know what? They don't blow out like balloons. They don't retract like your lungs. Because the air isn't going into your sinuses.

And why is that? Because the only connection between your sinuses and your nasal passages are these little tiny holes called ostium, and we all come in different sizes.

Well, your ostium come in different sizes, but they range from about the size of the head of that ballpoint pen to maybe in a big person or somebody who has big ostium, maybe the size of the plunger on that pen. It's measured in millimeters.

They are busy pushing mucus through them into your nasal passages. The mucus comes out

under this structure here called your turbinate. Then that mucus flows down the back of your throat and ends up not where your lungs -- not into your trachea, but into your esophagus and down into your stomach and it gets digested.

If you clear your throat, you can clear that mucus going in that route all day, every day, all night, every night.

Now, why do we produce this mucus? Well, that's another good question that medical scientists have pondered. There are several thoughts about it. One is that as that mucus flows into your nasal passages, it comes in contact with the air you are breathing and one of the thoughts is that it warms and moistens the air before it gets into your lungs.

Now, is it important that it be warmed and moistened? I don't know. But that's one of the thoughts they have as to what purpose it serves.

Another is that the mucus itself contains some kinds of cells called eosinophils or neutrophiles. You may have heard those terms, I don't know, but those things are part of the body's defense mechanism to fight off viruses and infection.

Because you know what? Every day when we take a breath, every time we touch something and we put it near our faces, there are viruses, there are bacteria that we are inhaling all the time and our bodies are constantly at battle trying to prevent those viruses and bacteria from taking hold in us and causing us to become sick.

In addition to that, when we take a breath -- so the thought is that those neutrophils and eosinophils are mixing with the air to some extent before it gets in our lungs, before it gets in our bodies and they are attempting to engage in some sort of fight with the viruses and bacteria that we encounter just by breathing every day.

Now, a third possibility is that mucus, as you undoubtedly sense from time to time, is a little sticky and a third thought is that it acts a little bit like fly paper; that when it comes -- when we breathe in, whether we can see them, sometimes we can see them like on a dusty day, sometimes we can't see them, like right now, you can't see anything in the air, but you know that when you take a breath, there are little bits of mold and fungus and dust, dust mites,

things like that, allergens, pollen. We don't see pollen in the air, but we know pollen is in the air, right?

Every time we take a breath, some of that is coming in contact when it enters the nasal passages, some of it comes in contact with the mucus, and like fly paper it attracts a little bit of it and it goes on down and instead of going to your lungs, it goes into your stomach and is digested and eliminated.

Now you have a sense of what the sinus system is about and what medical scientists to date anyway have thought maybe are the purposes and functioning of your sinuses.

Now, what is sinusitis? Well, that is the $64 question. Medical scientists have come to conclusions in very general terms about what is sinusitis, but in terms of what is going on truly in your body at the cellular level, fighting viruses and fighting bacteria level, at that level, there is a great debate going on as to what is sinusitis.

But in very general terms, sinusitis is when, remember I said there was tissue in here? When this tissue becomes inflamed, when it

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becomes inflamed, that's sinusitis, and it can lead to, see this little channel, it can lead to a blockage of that channel, that ostium, and if that happens, then the mucus can't flow out of the sinus and into your nasal passages, it can't take that normal route that it wants to take 24 hours a day, seven days a week. Now, that is the general thought about what is sinusitis.

Now, why is the inflammation occurring? What's really going on in your body? That's the $64 question. That's the one that medical scientists are debating, and I will talk about that more in a minute.

Now, what are the symptoms of sinusitis? Now you are going to get a sense of just exactly how difficult it is for doctors to get an idea about this disease, because here are the symptoms of sinusitis:

Post-nasal drip.

Nasal obstruction, that sense of a stuffy nose.

Headache.

Also facial pain.

Purulent nasal discharge. That means a colored, cloudy, it could be a little green, it

could be a little yellow nasal discharge that could come from the front of your nose or the back of your throat.

Facial pressure, just a sense of pressure.

Fever.

Halitosis. That's bad breath.

Loss of smell.

You can tell by looking at that list of symptoms, some doctors would put more on there, some would put maybe a little less, but generally speaking, those are the symptoms associated with sinusitis.

You can tell from that list you could have any number of illnesses and they could come out looking like that. You could have any number of things that would result in post-nasal drip or a headache or fever or loss of smell. So it's not a very precise list of symptoms and that's part of the problem of this disease.

But the idea is that when doctors think about somebody, when a patient comes in and has those symptoms, they start to think about this patient may have sinusitis.

Okay, now, there are types of sinusitis, and Ms. French is only making claim from this case

for one type, and that's chronic sinusitis. Depending upon what symptoms you have and how long you have them, doctors tend to assign a name to your disease of either, of your illness, of either acute -- it doesn't mean pretty, it means -- acute means sharp.

I'm sorry, your Honor. I have very few attempts at humor. I promise.

Acute means sharp. When I say sharp, when they use it in this sense, they mean short duration. Okay? A short period of time.

If you come into the doctor and you say doctor, I felt great yesterday, but today I have started to have these symptoms that I was just telling you about, and if you continue to have those symptoms for less than 30 days and at the end of that time you feel fine and you are back to normal, doctors call that acute sinusitis, and Mrs. French is not making a claim that environmental tobacco smoke caused her to get acute sinusitis.

There are two different types of acute sinusitis. There is just regular acute sinusitis, where you have it for less than 30 days and you get better, or you can have that a

occur, and this is why I have put the graph this way. You can have this occur multiple times within three months, a year, any timeframe.

But the key is if you start from being well, you have symptoms and then you get back to normal within a relatively short period of time, 30 days, even if you have multiple episodes of that in a year, they call that acute recurrent sinusitis, but it's still acute sinusitis.

A third possibility is you have that kind of symptoms where you are fine today, you feel bad and then you get fine again and it all happens within three months. They call that subacute sinusitis.

So those are the three kinds of acute sinusitis.

Now let's talk about chronic sinusitis because that's the illness that Ms. French is claiming she got as a result of her exposure to second-hand smoke.

If you have symptoms that never seem to really go away, but they get worse and they get better and they get worse and they get better and they last for longer than three months, then doctors tend to think that's chronic sinusitis.

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They won't know for sure, but if you come in and you have the symptoms that we described a minute ago and it lasts for more than three months, and most importantly, the symptoms don't ever seem to really go away, you are not well, you don't go from well to sick to well, then they tend to consider that that's probably going to be chronic sinusitis. Okay?

Now, even if they make this diagnosis, they still don't know what's really going on in your body because that's an unknown at the moment, and you will hear more about that, but they tend to describe that as chronic sinusitis.

How do doctors diagnose sinusitis, chronic or acute? Well, they call it a clinical diagnosis.

What does that mean? It means you can't go to the doctor and he will take a blood sample and they will send it off to a laboratory and a lab technician will run a test on it and call the doctor and say, "Aha, that patient has got acute or chronic sinusitis."

They can't do that. They can't take an x-ray of you, like you could take an x-ray of your arm if you think you have a broken arm, and

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boom, you see the break on the x-ray, the radiologist looks at it, calls up the doctor and says, "You know what? There is a break on the x-ray. This patient has got chronic sinusitis." You can't do that.

What they do is, they have you come in their office and they are going to make the diagnosis in the office. That's what they mean by a clinical diagnosis. They have you come in the office. They listen to your symptoms, your complaints. How have you been feeling? They listen to how long you have been feeling that way. You know, has it been a short time, has it been a long time? Has it been where you felt fine, then you got sick, then you felt fine, then you got stick, then you felt fine?

If they suspect that you may have sinusitis, then doctors will use a tool, an instrument called an endoscope. Now, it can be rigid or it can be flexible, but it will have a light on the end and it will either have a camera or it will have a little lens on it so the doctor can either look through it or he can watch it on a TV, and they will send that camera into your nasal passage. They will send it right down around

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here and they will send it all the way down here to just about where your larynx is, where your vocal cords are, and they will be looking to see whether or not there is any change in your mucus, whether there is any obstruction of your ostium, they will be looking to see if there is any coloration or if there is any termination of mucus flow.

They will be looking for any abnormalities in how your body was formed when G-d made you. They will be looking for a variety of things that could indicate to them that in fact the symptoms that you are there complaining about are related to your sinuses.

So they do an interview of you, they do an endoscopic exam and then if they suspect that you have chronic sinusitis, they will confirm it by having you go take a CT scan.

Now, what's that? If you think of your head as a loaf of bread, and probably no one thinks of their head as a loaf of bread, but if you think of your head as a loaf of bread, think of all the slices of the loaf of bread.

A CT scan takes a picture of you where you can take out each slice and then the doctor can

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look at each slice looking down on the slice of bread.

They will be looking for -- I don't have one handy, but they will be looking for thickening around this skin inside your sinuses.

Now, if you have the right symptoms, you have had them for the right period of time and now the CT scan shows thickening here, then the doctor will make the diagnosis of chronic sinusitis.

Now, I will tell you that that's still not a precise diagnosis, because you know what? That thickening could occur if you have a cold, if you have acute sinusitis, but doctors are trying to do the best they can in making this diagnosis.

So if you have all of that together, then they are going to say I think you have, you are going to make the diagnosis of chronic sinusitis.

Now you have a sense of what the sinuses are, what they are for, what is sinusitis and how do doctors diagnose it, so let's go to -- by the way, I should tell you that this disease, chronic sinusitis, it is the most common chronic disease in the United States today.

In 1994 there were 35 million people who had

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chronic sinusitis, went to the doctor in 1994. Today, there are more people than that that go to the doctor for chronic sinusitis. More people than that.

In the same timeframe, you know what? People's exposure to second-hand smoke has gone way down.

Why is this increase in chronic sinusitis occurring? Why has it been occurring for the last number of decades? Is it because of the things we eat or the things that are in the air or the things that we are exposed to? No one knows. No one knows.

All we know is that there are more people every year who come down with chronic sinusitis. Every year is an increasing number.

Now, let's get to the central issue here, the ham in the sandwich: Was Mrs. French's chronic sinusitis caused by her exposure to second-hand smoke while she was working in there with smoking permitted on airplanes?

What evidence are we going to present to you on that topic? We are going to bring you all the medical records that are available that pertain to her care and treatment for her sinus problems.

Truly, those records don't begin, we don't really have them until 1989. Unfortunately, to whatever extent she got treatment before that, if those records ever existed, if she made trips to the doctors, those records are either unavailable anymore or I don't know to what extent they existed in the first instance, but we also have her employment records from TWA.

I think that's probably now American Airlines. I am not sure if American bought TWA, but we have her employment records and her employment records give us a glimpse.

Now, they are not complete. They don't have all the medical records of every time she went to a doctor for any reason, but they give us windows into what kinds of medical problems was she having while she was working at TWA.

We have, for example, we will have correspondence that is from her employer in 1977 or thereabouts talking about why you missed time from work and what you will see is she suffered from the same kinds of problems that everybody else does: Flu, sore throat, strep throat, poison ivy, colds, the same kinds of problems that everybody else has.

Now, there will be some medical records, just two I think, that come about as a result of being in this pile of employment records, but we are going to give you all of that.

But we are not just going to hand it to you like this, we are going to help you through it as the case goes forward. I don't know if you have ever tried to read a doctor's handwriting, but I am going to show you some today and we are going to help you through those records as this case progresses.

In addition to that, we are going to bring you two doctors. You have already heard about Dr. Heinz Stammberger. We are also going to bring you Dr. Torres.

You have heard a lot of disparaging comments. You heard a lot of criticism of Dr. Torres. I invite you to watch and listen to Dr. Torres on the stand.

They said why did we have to go all the way to Graz, Austria to get an ENT? In fact we went around the corner. Yes, the young lady whose daughter worked in our office for a summer, for a summer, her father was Dr. Torres and when this lawsuit was filed and I needed to find an ear,

nose and throat doctor to do an examination, it turned out that her dad was a local ENT. That's all true.

But listen to the rest of it. Listen to all the criticisms you have heard of Dr. Torres and see whether or not you think they are justified when this case is over or if you don't conclude that Dr. Torres is one of the very fine local ear, nose and throat specialists right here in Miami. You will be given the opportunity to listen to Dr. Torres and evaluate him for yourself.

We are going to bring you those two physicians.

Now, the plaintiffs are going to bring you Dr. Persky. Dr. Torres and Dr. Persky have very similar educational backgrounds. They are both ear, nose and throat specialists by training, by medical education, and they both have practices that deal with patients who have ear, nose and throat problems.

But Dr. Torres is what I would call a traditional ear, nose and throat specialist. What do I mean by that? Dr. Torres treats patients day in and day out who have these kinds

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of problems. His patient population is made up of people who suffer from sinusitis, from problems with their ears, problems with their noses. That's his bread and butter practice all day long. That's what he pays attention to and that's what he is an expert in.

Dr. Persky from California, from out in Encino, divides his practice. You are going to get to see how he promotes his practice, but he divides his practice between working with patients who have ear, nose and throat problems and being a cosmetic and plastic surgeon dealing with facelifts, necklifts, nose reconstructions, and you will get to see which line of work he is actively promoting for his patient population.

You will get to weigh, and there will be other things that I will talk about here in a minute, that will allow you to determine which one of these two gentlemen you think should be given the greater weight regarding their testimony about environmental tobacco smoke and Mrs. French's chronic sinusitis.

You were told that they are going to bring some other experts. You were told they are going to bring a former Surgeon General. Yes, that is

a political appointment position appointed by the President of the United States.

He called him the top doc. I don't know what that means, but I can tell you that he is not a specialist in ear, nose and throat problems. He is not an otolaryngologist. He is a pediatrician and he was the Surgeon General quite sometime ago.

I think you are going to find him to be a very interesting gentleman, a very nice man, but definitely not a specialist in diseases of the sinus and chronic sinusitis.

Dr. David Burns, another gentleman who is involved in writing reports for the government, a pulmonologist. That's a guy who deals with diseases of the chest, not a guy who deals with diseases of the sinuses.

Neither one of those gentlemen, you are going to watch their video testimony, neither one of them is going to say I have ever treated a patient in my life who had sinusitis, either acute or chronic. Neither one of them is going to say that.

So what are Dr. Stammberger and Dr. Torres going to come tell you? They are going to come

tell you, there is no question about it, they are going to come tell you that environmental tobacco smoke does not cause chronic sinusitis. Period. End of story. And they are going to tell you why.

They are going to tell you exactly what everybody thinks, thinks, I didn't say knows, I said thinks, causes chronic sinusitis.

Now, this is the short list. This is the short list, but there is going to be no question that every ENT -- every textbook, every textbook written about sinusitis, chronic sinusitis, will have this list of potential causes, possible suspected causes of chronic sinusitis: Viruses. Bacteria. Number one and number two. Fungus. Dry air.

You know what? Do you know what the humidity level is on board aircraft? About 15 percent. Do you know why it is? Because the air that's brought into airplanes is brought in at high altitude and it's very, very dry air.

You can imagine that while it would be nicer and more comfortable for everybody if you had more moisture in the air, planes can't take off with big payloads of water just to moisten the

air that people are going to breathe on their flights.

MR. WEINSTEIN: Excuse me, Judge, may I approach?

THE COURT: I don't think it's necessary.

MR. WEINSTEIN: Then just at this point -- I will approach the bench later on. I will reserve.

THE COURT: If your point is that the airlines are not a party here?

MR. WEINSTEIN: No.

THE COURT: Something else?

MR. TROP: Improper bolstering of the textbook.

THE COURT: About the humidity in the air? Isn't that what we are talking about, the humidity?

MR. REILLY: Yes.

THE COURT: I am not sure what you are referring to.

MR. WEINSTEIN: That's why I asked to approach for a moment. I'm sorry. If I could just reserve it for after he finishes, I think it will be more expedient.

THE COURT: You may.

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Could you mark this?
MR. REILLY: Why is dry air a factor? Dry air is a factor because, as you can imagine, when mucus is flowing through here, if it dries out before it gets very far, that slows down the mucus, slows down the process, prevents the mucus from flowing naturally. So dry air is a problem.
Allergens. I have written immune response. That's a very simple way of describing what is a very complex thing that is at the heart of what medical scientists today are exploring regarding chronic sinusitis. I hate to get this technical with you, but I think it's only fair to do it with you for just one minute.
The thought is that what is really causing this inflammation in your sinuses is the body's inappropriate response to something, maybe fungus, maybe something else, but what's happening is the body is sending an army of white blood cells called eosinophils to your sinuses completely inappropriately, completely inappropriately, and they are attacking some perceived enemy that isn't really there.
It's not really an enemy, and as a result they are laying down this protein called major

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basic protein and it's irritating the lining of your sinuses and that's what's causing chronic sinusitis on a cellular, biological level. It is very complex, very controversial, not established, but that's where the science is headed today.
Barotrauma. When you go up in an airplane -- change in pressure. Dive to the bottom of a pool, you can feel the pressure. You can feel the pressure on your nose. You can feel the pressure -- that same pressure is occurring in your sinuses because they have a little tiny bit of air in them.
The same thing happens when you fly up in an airplane and when the plane descends. It's a pressurized cabin, but there is a change in pressure just the same.
So those are the common suspected causes of chronic sinusitis and that's what Dr. Torres and Dr. Stammberger are going to talk to you about as the causes of sinusitis.
Dr. Stammberger did not examine Ms. French, but Dr. Torres did, and Dr. Torres is going to come tell you exactly why he believes Ms. French has chronic sinusitis today. He will describe it

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as mild chronic sinusitis.
He will tell you that when he examined her, he took a history from her, his assistant took a history from her, he took a history from her, he examined her. He used that endoscope that I was telling you about and he made certain observations.
Number one, when he interviewed her, he learned, just as he suspected, that when she goes to work every day as a flight attendant, you know what? She encounters hundreds of people, hundreds of people every day. Hundreds of people get on a plane, hundreds of people get off the plane. Hundreds of people get on the plane. Hundreds of people get off the plane. When she goes through the airport, she encounters hundreds of people through the airports. Every day you encounter viruses, bacteria, fungus, dry air, allergens, barotrauma. It is just part of her work environment and it has been since the day she became a flight attendant in 1976.
In fact, she is going to tell you that her problems started in either '76 or '77 and they have carried right on through to 2002, to today.
But you know what? Right in the middle

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there in 1990, she stopped having any exposure to cigarette smoke on board airplanes. And Dr. Torres is going to say you know what? That's just part of how I know that environmental tobacco smoke is not playing a role in her chronic sinusitis, it isn't playing a role in anybody's chronic sinusitis.
Dr. Torres, when he did his endoscopic examination and when he reviewed the medical records, because we gave him all the medical records, when he reviewed the medical records, he made certain observations.
Mr. Trop indicated that maybe we would be talking about the possibility that she has anatomical variations that could play a role in the development of her chronic sinusitis.
My goodness, ladies and gentlemen, it is plain as day in the medical records of this case, whether she has a twin or not, Dr. Torres is going to tell you that she has bilateral concha bullosa.
That's a mouthful. What is that? Bilateral means on both sides of her nasal passages. This should be a thin straight line. It should be a straight bone right there. But instead, when G-d

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made Mrs. French, he gave her two clam shaped bones, concha bullosa, they are known to be predisposers for the development of chronic sinusitis.

I don't know whether her twin sister has them or not, but we know that she has them. They are readily apparent on her CT scan, which you will see from 1995. They are a known contributing factor for the development of chronic sinusitis. It's just a fact.

He also observed that she has -- you can have a natural ostium, you can have more than one ostium, you can have what they call an accessory ostium. It is sort of like having a sixth finger. Or you can fail to have a natural ostium and you can only have an accessory ostium.

Now, an accessory ostium is a small ostium. It is not the normal size. It doesn't allow the same amount of mucus to flow and it is not in the right spot. Mrs. French has an accessory ostium in her right maxillary sinus.

So she has bilateral concha bullosa, she has an accessory ostium in her right maxillary sinus. There will be no dispute that she has bilateral concha bullosa. I am going to show it to you

here in just a minute.

Dr. Torres will tell you when she had her surgery in 1989, and this is not a criticism of Dr. Persky's surgery, but a complication of the surgery is that you can get a little scarring right there at the site of the ostium and she got a little scarring, and that impedes the flow of her mucus going out of her right maxillary sinus.

So she has three reasons why she has, in addition to all the exposures that she has on her job and in her life, she has these three anatomical problems that are the predisposing factors that contribute to her development of chronic sinusitis.

Dr. Torres is also going to tell you that after his review of the medical records, there is no question that she didn't develop her chronic sinusitis until 1994 or '5. 1994 or '5.

How can you he know that? Well, as I said, we have some medical records that date back to before 1989. Here is one of them. This is the report of Dr. Joseph Traxler, who also is an ear, nose and throat specialist who saw Ms. French.

Ms. French didn't remember seeing him, but he saw Ms. French on November 2, 1987, and at

that time he specifically diagnosed her with acute sinusitis.

Can you people read that?

So no question that in 1987, November of '87, she was diagnosed with acute sinusitis. You will have this record for you in the jury room.

A year later, a year and a month later, she saw another doctor by the name of Edward Madey and he also diagnosed her with an acute illness, sinus infection.

So a year later, December 22 of 1988, he diagnosed her with another acute illness, and you can also tell the timeframe. Remember I said 30 days makes for acute sinusitis? He has got her off work from the 22nd of December to January 3, about ten days. Two weeks. Something like that.

So he says hey look, as of December of 1988, this is a lady who has acute sinusitis and she is not making a claim for acute sinusitis.

Now, Dr. Torres says look, when she goes to see Dr. -- I should back up and say that Dr. Persky is going to tell you, the doctor from California is going to tell you that he thinks she has chronic sinusitis as of 1989 when he saw her in August of 1989, but Dr. Torres is going to

say no, not in 1989, not until 1994 or 1995, and here is why.

When she comes to see Dr. Persky, he has a CT scan taken, and here it is.

Now, we don't have the scan itself, but here is the report of the CT scan and in it you will see that it says large air fluid levels seen in the maxillary sinus. Large air fluid levels, and air fluid levels are also seen in the ethmoid sinuses. I can't find it real quick. Small -- yes, small air fluid levels are seen in ethmoid sinuses right after that.

What does that mean? That means that if you were to draw a line right across here, what you would see above that would be black because it would be air, on a CT scan black means air, white means bone, gray means tissue.

Below that line you would see gray for tissue or in this case there would be fluid there because there is an active, acute infection going on.

This is textbook. When you see large air fluid levels, that is textbook indication that what you have going on is an acute illness, an acute bacterial infection.

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Then if there was any question about it, and look at the date of this because it is important. 9/6/89. That's the date the CT scan was taken. Okay? September 6, 1989.

Two weeks later Dr. Persky performs surgery on her sinuses. When he does it, he enters her ethmoid sinuses and he entered her maxillary sinuses and he says -- for example, here he says there was no fluid in the maxillary sinus. That air fluid level he had seen on the CT scan two weeks earlier, two weeks earlier, gone. An acute illness, just like a cold, gone.

Then look at what he says about the mucosa or the lining of the sinus. He says "and the sinus was observed to have normal mucosa." Mucosa is the name they give to that lining.

So what happened was in two weeks, in two weeks that acute infection that she had in her sinus had gone away. The mucosa was normal.

So that's how Dr. Torres knows that in 1989 she had an acute sinus infection, not a chronic one, because two weeks after the CT scan that has textbook indication of an acute problem, the problem is gone when the doctor opens up her sinuses.

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Now, how does he know that she didn't develop chronic sinusitis in between? Because that's '89 and he is saying '94, '95, because you will see the medical records. We are going to walk you through the medical records. There are not that many in between '89 and '95, and you are going to see that each visit, to the extent there were any, Ms. French is going to tell you "Hey, you know what? After my surgery I really didn't have any problems for about three years," and she is right, she didn't.

Then about '93, late '93, '94, she has a few visits, '95 she starts to have some visits, and then in 1995 another CT scan is taken and at this time she has mucosal thickening as seen involving -- I will abbreviate this, the left maxillary sinus and the right maxillary sinus. Antrum is another word for sinus.

Dr. Torres is going to say there you go, you have had the symptoms, the symptoms long enough and here is the confirmation on CT scan of a chronic problem. You can make the diagnosis with chronic sinusitis now.

But you know what? Mrs. French hasn't flown on airplanes with cigarette smoke on them for

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five years. For five years. She might have had a trip a year or something like that, but literally speaking, she hasn't been on airplanes with cigarette smoke on them for five years.

Now, that Dr. Torres says if you have any question about it, that confirms for me that even if you thought it was possible for cigarette smoke, for second-hand smoke to cause this lady to develop chronic sinusitis, even though there is no medical support for that, even if you thought that, if she hasn't been exposed in any significant way for five years, how could you possibly make a connection? That's what he is going to tell you.

Now, when there was no lawsuit involved here, when there was just caring for the patient and trying to figure out what's wrong with her, Dr. Torres is going to say I also think that this lady ought to be checked for allergies because people have been talking about allergies in this lady for a long time, but they have never tested her and allergies frequently can play a role in the development of sinusitis.

He will say and there will be confirmation in the very medical records of Dr. Persky, and

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his partner Dr. Pleet, and I show you this. You can't read this, it is too small print. I am sorry for the size of it, especially over in the corner, I know, but take my word for it here that this is the first page of the medical records of Dr. Persky's office.

The first time she was seen there was June 26 of 1989 and she was seen by a Dr. Pleet. I don't know if he is partners with or what his relationship with Dr. Persky was, but that's the guy who saw her first.

Here is what he did. He diagnosed her with having allergic -- you can't read that word, but it's rhinosinusitis. Allergic rhinosinusitis. Allergies, as you remember from my list, is one of the suspected causes of chronic sinusitis. There it is. Allergic rhinosinusitis.

Nobody is thinking about suing somebody. You don't see any reference to second-hand smoke, ETS or any other label on it.

What does he prescribe for her? Seldane, a medication for allergies, as well as Ceftin, a medication for -- it's an antibiotics.

So what is he thinking is wrong with this lady? Allergies and a bacterial infection. What

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did I have on my list of suspects for the cause of sinusitis? Allergies, bacterial infection.

Is he alone in this? No. Dr. Persky -- this is Dr. Persky's chart. I will just make this brief. The first time Dr. Persky sees her is August 9, 1989, and at that time, a little jumping again a bit, he diagnoses her with chronic sinusitis, but what does he write? Allergic rule out, that's what R/O means, rule out anatomic causes.

Anatomic causes? That's bilateral concha bullosa, accessory ostium, deviated septum. He is saying to himself here are the things that I think are causing this lady's sinusitis. I think she has got allergies. You need to rule out anatomic causes.

I don't know if Dr. Persky has ever told Ms. French that in 1989 he missed her bilateral concha bullosa. I don't know if he has ever told her that. I don't know if he has ever told her that it's on the 1995 CT scan. I guess we will find out in this trial if he has ever even told her that.

Allergic, rule out anatomic causes. Did he rule out the anatomic causes? Absolutely not.

Absolutely not.

Has he ever dealt with her bilateral concha bullosa? Absolutely not.

He gives her Seldane, more medication for allergies. He gives her antibiotics. More medication for bacterial infection.

Nowhere on here will you see environmental tobacco smoke. Nowhere. Nowhere will you see second-hand smoke. Nowhere will you see involuntary smoke.

Dr. Persky will acknowledge that Ms. French, even though he has said I can't rule out allergies as the cause of her chronic sinusitis without testing her and the only test that I believe would be accurate would be a skin test. He has never tested her for allergies. Even though you saw that both he and his partner were prescribing medication for her and writing down allergic rhinosinusitis, chronic sinusitis, allergic, have they ever tested? No.

You know what? Dr. Persky is going to come here and he is going to say the only time he has ever even inquired of Ms. French about allergies is he called her on the phone a couple of months ago and said do you have allergies? She said no.

Well, if you are never tested, I don't think you will ever know the answer to that. But I don't think, I think you are going to see that the evidence is that's an inadequate inquiry into whether or not somebody has allergies, to call them on the phone and ask the patient do you have allergies.

You are going to find that Dr. Persky has not looked with an endoscope in Ms. French's nasal passages since the surgery in 1989. I don't know whether, and I just said I don't know whether he has ever advised her of her bilateral concha bullosa. He is going to admit that concha bullosa are known predisposing factor for the development of chronic sinusitis.

I don't think he has ever seen the scaring that resulted from his surgery, because he has never looked with an endoscope into her nasal passages since the surgery.

I know he has never tested her for allergies. He had the chance -- within the last 60 days he asked Mrs. French to go get another kind of study done to see if she had an immunologic deficiency of some kind, to see if she needed gamma gobulin shots.

At the same time too he could have asked her to please go get a skin test to see whether or not you have allergies, but he didn't. But he didn't.

Now, Dr. Persky is going to come here and he is going to -- by the way, within the last 30, 45 days, Ms. French has gone to see another doctor, a doctor by the name of Wolfberg for problems that she was having and he also prescribed allergic medication for her. He gave her Clarinex and Flonase.

So here we are, a completely different doctor, a completely different kind of doctor. It's like bookends. You have the very first doctors saying hey, I think we have got allergies, you have the very most recent doctor saying hey, I think, I am going to treat this patient with allergy medicine.

Is she going to get tested for allergies after this trial is over? Is she going to get her bilateral concha bullosa resolved after this trial is over? Is she going to get the scaring by her right maxillary ostium resolved? It can be resolved. Is that going to occur after this trial is over? I don't know.

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Real quick, just so you had a look at it, this is a CT scan. They are very hard for people who have never looked at them before to understand at all and I understand that, but all I would ask you to do is you see that little loop right there, that little black loop. See, black is air, white is bone and gray is tissue. Okay?

See that little circle right there? That's one-half of the bilateral concha bullosa. That should be a straight line instead of an air pocket. But you can see the air pocket right there. And in that air pocket you can develop infection all by itself, even though it doesn't communicate with the outside world at all.

You heard about paralysing cilia. Well, the cilia, there is a little bit of a misconception as to what the cilia do. The cilia line, they are at the very top of the cells that line the inside of your sinuses and they sit there like arms like this.

If you have ever been to a stadium and watched people do the wave, they do the wave, and they do a short stroke back and a long stroke forward like they are pushing something. That's what they do with the mucus that's being made in

your nose. They just push it ahead, push it ahead.

Dr. Persky is going to tell you that yes, he thinks that environmental tobacco smoke can cause somebody to develop a paralysis, a partial paralysis or a temporary paralysis of their cilia so that they don't go like this or they don't go like this quite as well, but he is going to have to admit that there have been no studies to support that concept in people from environmental tobacco smoke that have established that that's in fact true in the sinuses.

He is going to have to admit, he is going to tell you, I think, that he believes he could have conducted some kind of tests on Ms. French to see whether or not environmental tobacco smoke had that effect on her. I don't know what that test would have been, but he is going to say I never did it, I never did it.

Dr. Persky is going to admit that there is no way for him to rule out all these things that she encountered on her job as possible causes for the development of her sinusitis. Viruses, bacteria, molds, fungi, that's plural for fungus, dust mites, allergens, pressure changes, dry air

and other suspected causes.

He is going to admit, he is going to agree with Dr. Torres that the concha bullosa may predispose someone to develop chronic sinusitis. He is going to agree with all of that.

He is going to agree that he has never resolved her concha bullosa. He is going to agree that he never got allergy testing for her, he is going to agree that he has never had the scaring resolved and he will probably agree that he has never even see it. And he will agree she has not been exposed to environmental tobacco smoke on board airplanes, at all, zero, since 1996, I believe, it might be 1997, but I believe it's 1996 for her personal life. So that's what? Six years ago.

When you see her flying history, what she tells you, she is going to tell you that after 1990, she took about one flight, one international flight a year and there may have been smoking, there would have been smoking on those flights until about 1996 or so.

THE COURT: Time, counsel.

MR. REILLY: Thank you, your Honor.

Let me just say to you that I'm now going to

sit down and let Ms. Tedder come up and explain to you about her, about Ms. French's exposure to environmental tobacco smoke on board aircraft and then you will get to see whether or not the evidence is actually going to bear out what she described as, what was described to you by Mr. Trop as 70 to 80 hours a month for 20 something years. You will get to determine whether or not that's really accurate.

Remember what I said at the beginning of this, these are the promises we make to you. Some of the things you know. I have just shown you the records, so there is no doubt about them, but these are the promises we have made to you, these are the promises I make and the promise that Mr. Trop made and I look forward, I am going to sit down now, but I look forward to getting together with you again at the end of the case when I get to show you, we get to review together whether I have kept my promises about what the evidence was going to be.

Thank you very much.

MS. TEDDER: Good morning, ladies and gentlemen. My name is Gay Tedder and as Mr. Reilly told you, I, along with Mr. Engram, Mr.

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McCue and Mr. Reilly, represent the defendants in this action.

I am the last of the three people that you are going to hear from this morning and hopefully my presentation will be the shortest. I know it is closing in on the lunch hour and I will try to be brief.

My topic this morning is to talk to you about exposure, Ms. French's exposure to environmental tobacco smoke.

The evidence in this case will show that there is no level of exposure to environmental tobacco smoke or to second-hand smoke which causes chronic sinusitis. That, as Mr. Reilly said, is what Dr. Stammberger will talk to you about and that is what the evidence in this case will show, but I jotted down a couple of things as Mr. Trop was giving his opening, when he was telling you what the evidence in this case would show, and I jotted down, with respect to Ms. French's exposure to environmental tobacco smoke or to second-hand smoke something that he said.

He said that you would learn that she was exposed to days, weeks, years of constant and heavy exposure to tobacco smoke, exposed over and

over again, and that she worked 70 to 80 hours a month all of her career.

Well, I want to talk about Ms. French's exposure to environmental tobacco smoke. What will the evidence in this case show with respect to what Mr. Trop told you about her exposure to environmental tobacco smoke?

Before I talk about that, I want to take just a detour for just a quick minute because I want to talk about the term environmental tobacco smoke or second-hand smoke, which is something that everybody has used so far in this trial.

Well, what is second-hand smoke or environmental tobacco smoke? It's really composed of two things. If you have a cigarette and the cigarette is lit, there is smoke that comes off the end of the cigarette in a stream. That's called sidestream smoke and you will hear some testimony about that.

You will also hear about mainstream smoke, which is the smoke that if a smoker takes a puff off of a cigarette and they exhale that into the air, they exhale that mainstream smoke, and those are two components that make up environmental tobacco smoke or second-hand smoke.

But there is one other concept that you need to understand about that, and that is the concept of dilution, that smoke is diluted into the air around it.

The easiest way to think about that is to imagine a lit cigarette. That little stream of smoke that comes off the end, you see that for a while, but at some point it disappears into thin air. That smoke is diluted by the air around it, and the same thing happens with respect to mainstream smoke that the smoker exhales. You see it and then it disappears into the air around the smoker and that's called dilution.

So mainstream smoke, sidestream smoke and dilution make up second-hand smoke.

My topic is Ms. French's exposure to environmental tobacco smoke. What will the evidence in this case show about that? Mr. Trop talked to you about some flight attendants that he was going to bring in and he said, he said to you although it's hard to remember, the flight attendants will tell you about what it was like on the plane during the time that smoking was allowed, and those are the witnesses that he will bring you.

But the only witness that you will see who has made any attempt to measure or estimate the amount of second-hand smoke that Ms. French has been exposed to is a witness that will be brought to you by the defense, and that witness we are going to talk about in a little bit, and his name is Dr. Chris Teaf.

Dr. Teaf will tell you that to determine someone's exposure to environmental tobacco smoke, you need to look at a couple of things. You need to look at the time period that they were exposed and you need to look at the concentration of second-hand smoke that they were exposed to.

We are going to look at what the evidence in this case shows about both of those things. Concentration just means how much at any given time. For example, if you had 50 people on an airplane and all 50 people were smoking, that would be a concentration level of 100 percent.

If you had 50 people on an a airplane and 25 of those people were smoking, that would be a concentration level of 50 percent.

Dr. Teaf is going to talk to you about that, and we are going to examine what the evidence in

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this case will show about the time and the concentration of Ms. French's exposure to environmental tobacco smoke.

To do that we need to look at a couple of things. You will see how I do with these boards. If I am the first one to keep all my boards up, I will be doing well.

To determine the exposure to environmental tobacco smoke, you need to look at smoking bans, the employment records in this case and what the witnesses in this case are going to say. I have two witnesses listed down here.

Ms. French, as you know, and as you have been told, began working for TWA in 1976 and at the time that she went to work for TWA in 1976, smoking was allowed on board airplanes. That continued, and airplanes, by the way, were separated into smoking and nonsmoking sections. Both first class and coach had a section for smokers and a section for nonsmokers.

Smoking was allowed on aircraft and that continued until April 23, 1988. After that date Congress enacted a ban on smoking of flights of two hours or less. So after that date, if you were a smoker and you were on an airplane flight

that lasted two hours or less, you couldn't smoke on that flight anymore.

On April 23, 1988, that is about a year before Ms. French goes to see Dr. Persky, the doctor who did her sinus surgery.

That continued until February 25, 1990, and on February 25, 1990, the law changed. After February 25, 1990 there was a ban on smoking on flights of six hours or less.

So again, if you were a smoker and you -- six hours is a long flight, but if you were on a flight that lasted six hours or less, you couldn't smoke on that flight anymore.

After February 25, 1990, Ms. French had almost no exposure to environmental tobacco smoke. How do we know that? Well, we know that because the evidence in this case and her own testimony will show that after February 25, 1990, which is, by the way, just a few short weeks after she comes back from her surgery with Dr. Persky, but after February 25, 1990, Ms. French is flying primarily domestic flights, within the United States, all of which are six hours or less.

So she has basically almost no exposure to

environmental tobacco smoke after February 25, 1990, and I think as has already been mentioned, she did have -- she may say she had an occasional international flight after that, but her primary exposure was between 1976 and 1990.

What else do we need to look at to determine the time and concentration? We still need to look at TWA employment records and what they tell us and what the witnesses in this case are going to say.

What about the TWA records? What do they tell us? We will give you all of the records that exist. Unfortunately, we will give you all that we have and all that exist. Unfortunately, not all of the records for the period 1976 to 1990 still exist, for whatever reason.

You will hear some testimony about something, for example, that's called a flight log, and a flight log is a record that the airline keeps of where a flight goes to and how long each flight is. We don't have flight logs for the years 1976 to 1990. There are some flight logs from 1994 to 2000 for the period Ms. French flew, none between 1976 and 1990, which would tell us exactly where she flew and exactly

how long each flight was. But we do have the TWA employment records.

What can we learn from those records? Well, those records will give us a glimpse of the years that Ms. French worked for TWA. They won't -- and those records can show us the time Ms. French wasn't exposed to environmental tobacco smoke because she wasn't flying.

For example, take a look at this chart. Let's see if you can see this. This is a chart which is reflective of the records that TWA has. So between 1976 and February 1990, can you see there is a year listed on the bottom, 1976 through 1990, and on the right-hand side or what's my right-hand side, is the zero to 365 days in the year.

For example, you can look at the green columns, which will tell you the total days absent according to the TWA records.

The blue column reflects sick leave.

Red reflects the evidence in the TWA records that Ms. French was absent from work due to sinusitis.

So for example, if you look at this, for the year 1979 you can see, for example, that Ms.

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French wasn't exposed 225 days that year. Only 18 of those days were sick leave and none of those days were due to chronic sinusitis.

If you look at the records, they will tell us when Ms. French wasn't exposed to environmental tobacco smoke.

The evidence in this case will show that the vast majority of time Ms. French was off work was for reasons totally unrelated to her health. She had the opportunity to take company offered leave, vacation and time off for reasons that were unrelated to her health, and as you can see, the records that we have reflect very few sick days which are related to chronic sinusitis.

You will also hear some testimony in this case about the work schedule of a flight attendant. You will hear that the average flight attendant works 75 hours a month, approximately, which is about 192 days a year, but that's spread out over a 365 day calendar year, and for Ms. French, this is what the TWA records will reflect with respect to the time she was absent from work.

What else will we learn in this case about time and concentration of environmental tobacco

smoke that Ms. French could have been exposed to in her career?

As I said, we are going to hear from several witnesses. The first witness that I have listed there is Rodney Sands. Mr. Sands is a professional engineer and he is also a designated engineering representative, which means he has a certificate from the FAA. He is a former engineer. He worked for Boeing Commercial Airlines from 1984 to 1999, and his job was to design ventilation systems on aircraft, and he is going to come in and testify and he is going to talk about something called the environmental control system, also referred to as ECS. The environmental control system on airplanes.

He is going to talk about the air supply, the ventilation on planes and also something called the air exchange rates. He will tell us why, when you work during the time that smoking was allowed on aircraft, when you were a certain distance in the plane away from the smoking section, you were not exposed to much environmental tobacco smoke.

Why not? Because of the air circulation system in the plane. He is going to explain when

the plane was flying in the air, how the air came in and how the air came out.

If you look at this chart, you can get a sense of what he is going to tell us about the air circulation in the cabin of the airplane and how that worked. I will try not to block anybody here.

Cabin air circulation. How does it work? By this chart you can see that air, outside air comes in and it comes in above the engine. It's not -- air is pulled in before it goes through the combustion process.

So air is pulled, fresh outside air is pulled in and you can see by the red line that it is cool. It comes in and it goes to what is called a mixing chamber. The outside air is blended in the mixing chamber with, in this particular drawing, recycled air from the cabin.

If you follow the blue line, you can see a circulation flow of air in the airplane. It's pulled up, it goes from the roof, and you can see that the blue arrows down represent vents and the air comes from the roof of the aircraft, it circulates in a circular motion through each row and then the green line that I have here, which

is number 4, the air goes to the floor of the aircraft, goes out of the aircraft and in this particular drawing some of that air is recirculated and it goes through some filters right down here. The air that's going to be recycled in the plane, it passes through the filters, and there are some very special filters that we are going to talk about in just a minute.

This shows the airflow in the cabin and it shows that the air comes up through the top, circulates in each row down and is pulled out through the floor.

What is the significance of that? Dr. Sands is going to tell you that is significant because during the time that smoking was allowed on aircraft, that airflow, from the top to the bottom, helped to keep second-hand smoke from drifting, drifting to the front of the plane, drifting to the back of the plane.

He will also tell you that during the time smoking was allowed on aircraft, that within two or three rows of the smoking section on the plane, you couldn't measure environmental tobacco smoke in the airplane. That's due to this ventilation system.

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He will also tell us a little bit, as I said before, about the environmental control systems on airplanes.

I will tell you that each plane has an environmental control system. The environmental control system, it is part of what we just looked at, how the air comes in and how the air goes out, but it will also tell you how many times in an hour the air changes in modern aircraft.

This chart depicts at the bottom various types of aircraft which Ms. French will tell you and the evidence will show she flew in this case. For example, you have the 757, the L-1011, which is another type, the MD 80, which is yet another, and this line represents zero to 40, which would be the number of times per hour in the aircraft.

You can see it changed, the air changed in the aircraft from 20 times an hour to 32 times an hour. That means that every two to three minutes the air in the aircraft was completely changed.

So on the 757, the air was changed every 1.9 minutes, but even on the 747, the air was changed every 3 minutes.

So regardless of the plane Ms. French flew, the air in that plane was completely replaced

every two to three minutes.

Dr. Sands will tell you how that compares, for example, to your home. He will tell you that the number of air changes per hour in an aircraft is far more frequent than the number of air changes in your home. He will also compare it to a work environment and he will tell you that the air changes every two to three minutes in these aircraft is far more frequent than the number of air changes in any work environment that you work in.

As I said, now, I have mentioned a couple of times, he is also going to tell us that there are two kinds of environmental control systems. One of them is called a one pass system and the other one is called a recirculation system.

The drawing that I had up here earlier of the cabin that pulled outside air in and pushed it up through the top of the cabin, that was a recirculation system, but the one pass system means outside air comes into the plane, goes up through the roof of the cabin, circulation down through the rows and out of the aircraft. It makes one pass through the aircraft. Outside air comes in, goes up, is pulled out of the bottom of

the aircraft, makes one pass, so it's called a one pass system.

The recirculation system is, it recirculates some portion of the air in the aircraft, and that's the picture that we looked at just a minute ago.

One of the things that you will learn about the particular kinds of aircraft that Ms. French flew, what is the percentage of outside air in those aircraft?

Again, this chart shows the various kinds of aircraft that Ms. French flew. Down at the bottom you have the 757, 747, this is the L-1011, what percentage of the air at any given time is outside air, zero to 100 percent.

On certain of the planes she flew, for example, the L-1011, you can see that shows 100 percent outside air. That's an example of the one pass system that I told you. The air is pulled in, it goes down, up through the roof, goes through the cabin and back out the bottom. That's one pass. 100 percent fresh air.

But you can also see, and I told you that certain planes are planes that recirculate a portion of the air, on the 747, which is an

example of a plane that recirculates air, 77 percent of the air is outside air at any given time. So only a portion of the air is recirculated.

One of the things that he will tell you about, that Mr. Sands will tell you about planes that have a recirculation system is they also have a very special kind of a filter. When we were looking at the picture before, I mentioned the filter, which was right down here in the bottom, and I said we will talk a little bit about that. It is a very specialized sophisticated filter and it's called a hepafilter, and that filter is designed to remove fumes and smoke and odors and particles from the airplane.

Dr. Sands will tell you that those filters work very well in filtering out smoke and smoke particles.

All right, we have talked about the employment records, the smoking bans and a little bit about what Mr. Sands is going to tell you, so I want to talk about my last topic this morning and the last witness that I am going to talk about, and that is Dr. Chris Teaf. He is listed

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right down here.
Dr. Teaf is an Associate Director for the Center of Biomedical and Toxicological Research and Waste Management at Florida State University. He is a toxicologist and he specialize in risk assessment. He is not an MD doctor, he is not a medical doctor, he is a Ph.D.
Part of what Dr. Teaf does is measures things. For example, he looks at air, at the contaminants in air and ground water and he takes that information and he is able to tell people something about the quality of the air or the quality of the water. For example, if you were measuring ground water.
We gave Dr. Teaf Ms. French's employment records and the other information in this case and we asked him to estimate in his opinion the amount of second-hand smoke that Ms. French was exposed to.
What will he tell you? What he will tell you is that the amount of exposure to second-hand smoke is far less than that the plaintiff's counsel represented to you.
He has looked at the TWA records to determine what Ms. French's exposure could have

been during the years that smoking was allowed on aircraft, and as I said before, he will also tell you that you need to know the concentration of environmental tobacco smoke that she was exposed to in the plane, and he will tell you about certain government studies that he has looked at to measure. These are studies that were done on airplanes at the time that smoking was allowed and he has looked at those studies to see what they say about the amount of environmental tobacco smoke that was on airplanes during that time.
He has used all of those, he has used those studies and he has used his review of the records to determine that Ms. French in fact had a very low exposure to environmental tobacco smoke during the years that smoking was allowed.
He will tell you that in his opinion, she was exposed to somewhere between 4- to 500 hours of environmental tobacco smoke a year.
He will compare that to other environments. For example, he will tell you that Ms. French's exposure to environmental tobacco smoke is approximately, at that time it was approximately half of that of someone who had a spouse who

smoked.
He will also compare it to someone who worked in a work environment, five days a week, 50 weeks a year in a situation where smoking was allowed, and he will tell you that Ms. French's exposure was approximately one-quarter of that of a worker who works in an environment where smoking is allowed.
That particular individual is exposed to approximately 2,000 hours of smoke, environmental tobacco smoke in a year. Ms. French's exposure, he will tell you, is approximately one-quarter of that.
So ladies and gentlemen, when you look at the evidence in this case and what it shows about Ms. French's exposure to environmental tobacco smoke, the time period that she could have been exposed to, the evidence in the employment records and what the witnesses in this case are going to say, and you are going to listen to the only witness who will come in and tell you he has made an attempt to estimate or measure Ms. French's exposure to environmental tobacco smoke, you will conclude that the exposure that Ms. French had is far less than the exposure that

plaintiff's counsel told you.
At the end of this case, we will ask you to render a verdict for the defendants.
Thank you for your time and attention.
THE COURT: As soon as we remove some of those exhibits, we will break for lunch.
Do the attorneys have anything that I have to address with them before we start with your first witness? I just want to take this into account with the jury's schedule for lunch.
MR. REILLY: Not that I know of.
MR. TROP: We have to conclude the issue, the second videotape.
THE COURT: Let me speak with you for just a minute here.
I am sorry, they will give me an idea of when to come back.
(At the side bar)
THE COURT: Who will be your first witness?
MS. WEINSTEIN: David Burns, but we need to have time to have Dr. Richmond's video edited.
THE COURT: You are not going to be presenting that today.
MS. WEINSTEIN: We might. It depends on how fast the witnesses go.

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THE COURT: After Dr. Burns, and Dr. Burns isn't going to be too long.
MS. WEINSTEIN: 30 minutes or so.
THE COURT: Then who?
MR. REILLY: I don't think we are through arguing Dr. Richmond.
MS. WEINSTEIN: That's what we are talking about.
THE COURT: Then Lani Blissard.
MS. WEINSTEIN: She will testify, Maureen Gill, and Jason Brown, we have to proffer his testimony to you. We have not finished the testimony of Dr. Richmond as far as the designations. Marie Fontana, you haven't ruled on that, although we can take that up at the end of the day if you want to.
THE COURT: Let's see how we can have as few interruptions for the jury as possible.
MS. WEINSTEIN: The only reason I suggest doing Dr. Richmond is because it has to be edited.
MR. REILLY: We won't be able to review it.
THE COURT: How about if I tell the jury to come back at 1:45 and we come back at 1:15 to finish Richmond or would you rather do it now?

MR. WEINSTEIN: After lunch.
THE COURT: I will tell the jury 1:45.
MS. WEINSTEIN: One problem is the editing and if we did it now, I can get it to the video place, because I have to get it to counsel.
THE COURT: I was figuring you want to do it now.
MR. REILLY: It's not going to be able to be viewed. It is going to be take time to be edited. We will have to argue it, they will have to edit it and it won't be until tomorrow morning anyway.
THE COURT: Let's have lunch first and meet at 1:15 and I will rule on the rest.
(Jury present)
THE COURT: I am going to meet with the lawyers at 1:15, but I am going to ask the jurors to come back at 1:45. That will give you a little longer break than usual, but that will be so we can handle some of the matters.
I don't know whether Nicole may have mentioned this to you or any of you is interested in this, but this is one of my pet projects. It has nothing to do with this case.
We have a program where jurors are permitted

to go to the art museum, the Miami Art Museum. I don't know if you are familiar with it, but when you walk out the front of the courthouse, which is Flagler Street, if you turn to your right, there is a complex. There is actually a historical museum and the art museum and the library up to your right right over the next street.
Anyway, if any of you are interested in going to the art museum, you are permitted to go free with just your badges. We haven't worked it out with the historical museum yet I don't think, but the art museum.
Anyway, any time that you have some extra time and you feel like going over there and seeing what's being displayed, you are welcome to do that, and I encourage you to do that because you might not have another opportunity. So I try to get jurors to go over there. If you are interested, please take up that opportunity.
In any case, please report back at 1:45 then be out here on the sixth floor.
We will collect your notebooks from you and don't discuss anything about the case, please, among yourselves.

You can write your name on the back or the front or anywhere, yes, sure, that's fine, and then we will know whose they are.
Okay, you are excused.
(Jury not present, 12:00 noon)
THE COURT: We will meet at 1:15.
MR. WEINSTEIN: Your Honor?
THE COURT: Yes.
MR. WEINSTEIN: Your Honor, you may recall that during the opening I'm going to say argument, because I believe a great deal of their opening statement was argument, but I asked if your Honor would reserve for later to at least allow me to make an objection for the record because it is over and I can't cure it.
THE COURT: Yes, and what was that about?
MR. WEINSTEIN: Mr. Reilly made a remark saying that every textbook says and then he gave a list. He gave a list to the jury of what every textbook says.
Number one, no textbooks are going into evidence.
THE COURT: Tell me what exactly was said.
MR. WEINSTEIN: He said to the jury every textbook says.

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THE COURT: Says what?
MR. WEINSTEIN: Says -- well, it said a whole bunch of things, that you need these symptoms, you need this, you need this.
Now, first of all, he is not bringing in, I don't even think the court would allow it, every textbook, number one.
Number two, textbooks are not going into evidence anyway because a textbook generally, as you have said, can be used, if found authoritative, unlike the Surgeon General, which is a different category --
THE COURT: In cross-examination.
MR. WEINSTEIN: -- in cross-examination.
And not only did he say the textbooks or some textbooks or a textbook will be used in cross-examination, but he said every textbook will.
THE COURT: That may be inappropriate to refer to a -- I didn't hear that part and I'm sorry that I didn't hear it at the time.
MR. WEINSTEIN: That's whether when I asked to approach the bench.
MR. REILLY: It is not inappropriate, your Honor.

THE COURT: Why not?
MR. REILLY: Because I am not saying I am going to put in evidence every textbook. I have never said that.
THE COURT: No, but it's like referring to sources to bolster your opinions. You can't refer to these sources, especially if you are not putting them into evidence. That doesn't help you, I think that hurts your position.
You can't say my expert believes this and it is like asking the expert, "Expert, doesn't every textbook support your opinion?" You can't do that.
MR. REILLY: But what I get to do is take his expert and say "Dr. Persky, every textbook you looked in said this is so."
THE COURT: No, you can't do it that way if they would object, because you have to have him acknowledge that it is authoritative and so on.
MR. REILLY: That's the ultimate question. I don't want to have to give my entire cross-examination away, but I can absolutely do these things.
THE COURT: If you are referring to textbooks that you would use in cross-examination

that they would recognize as authoritative, you may do that. If that was the context, fine. That wasn't the context for this. Assuming that's all he is going to be able to do, he can't ask his own witnesses, you are right.
MR. WEINSTEIN: There wasn't a context. He said what every textbook will show.
THE COURT: Maybe he will get that from your client, so I am going to overrule your objection now.
MR. WEINSTEIN: How would my client know what every textbook?
THE COURT: Not your client, your expert.
MR. WEINSTEIN: How would my expert know what every textbook said? That's the reason, I know your Honor wants to move it along, but --
THE COURT: He may do it only as is permitted under the rules, you are right. He can't bolster his own clients.
MR. WEINSTEIN: He already said that to the jury and that's an in opening and it severely damages, it severely prejudices our case and I move for a mistrial coupled with a request for him to pay our expenses.
THE COURT: I will take it under advisement.

You might not want that.
MR. WEINSTEIN: No, coupled with our a response that he pay our sustained expenses for preparing experts.
THE COURT: I won't even withhold. I will rule now. I will deny your motion for a mistrial on that basis.
MR. WEINSTEIN: Could you give an instruction to the jury?
THE COURT: What would you want me to say?
MR. WEINSTEIN: To disregard Mr. Reilly's remark "what every textbook says."
MR. REILLY: That is completely erroneous, your Honor. I get to use textbooks to cross-examine his expert.
MR. WEINSTEIN: Every textbook, Mr. Reilly?
MR. REILLY: Every one he has ever looked at. Every one he has identified.
THE COURT: May I have the court reporter just tell me exactly what Mr. Reilly said, not right now, but later? We are going to go to lunch, but I don't think it is the basis for a mistrial.
MR. WEINSTEIN: Did you Honor deny my motion for a mistrial?

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THE COURT: I did so. I did.
I would like to have a recess now.
(Luncheon recess at 12:00 p.m.)

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